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No. 57,284-C

THE CITY OF TEMPLE, TEXAS

v.

MICHAEL McKELVA, ALLEN BOYER
and T. C. McKELVA, et al.

In the District Court of Bell County Texas
169th Judicial District

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

2-1-73 Def. mtn. to quash subpoena heard and considered. Subpoena modified to exclude items listed in Par. 1—in all other respects motion overruled. Motion as to burden of proof taken with the case. City's mtn. to hold Def. in contempt for failure to comply with subpoena heard & considered—def. given 'til 1:00 p.m. (2 hrs.) to comply with subpoena under threat of contempt. Testimony begun. Court reconvened at 1:15 p.m. Def. Michael McKelva failed to respond to subpoena—found to be in contempt—punishment deferred until conclusion of trial—evidence concluded at 3:45, recessed to 2-2-73 at 9:00 A.M.

2-2-73 Arguments taken—findings of obscenity, injunction granted, notice of appeal. Def., attys Maness and Maley found to be in contempt. Punishment assessed against Def. Michael McKelva and his

attys, Karl Maley and Michael Anthony Maness of 10 days in Bell County Jail and a fine of $200.00 each. Attys released on personal recognizance pending hearing under Article 1911A sec. 2-C. Presiding notified. J. F. Clawson.

2-8-73 10:00 a.m.—Def. McKelva having served 7 days, credited with 3 days for good behavior, balance of sentence remitted including $200.00 fine as to him only.

* * * * *

SUBPOENA

STATE OF TEXAS
COUNTY OF BELL

TO ANY SHERIFF OR ANY CONSTABLE WITHIN THE STATE OF TEXAS, GREETING:

You are hereby commanded that you serve by delivering a copy of this subpoena to Michael McKelva, and thereby to summon said Michael McKelva, who resides at 526 Wolf, Killeen, Bell County, Texas, and he shall thereby know that he is summoned, to be and appear before the 169th District Court, to be holden in and for the County of Bell, at the courthouse thereof, in the City of Belton, on the 1st day of February, 1973, at 9:00 o'clock a.m., then and there to testify, being thereunto summoned at the instance of the plaintiff and by request of William T. Wilson, his attorney, in a certain suit now pending in our said court, the style of which is The City of Temple, Texas v. Michael McKelva, Allen Boyer, and T. C. McKelva, et al and the number, No. 57,284-C, and that he do diligently and carefully search, examine, and inquire for, and bring with him

and produce, at the time and place aforesaid, certain magazines entitled as follows: RAPTURE; HARD LOVE; PRIVATE ISSUE H; PRIVATE ISSUE F; FRENCH LUV; PRIVATE ISSUE G; SEXUAL FANTASIES; PRIVATE ISSUE E; SEX TECHNIQUES; PRIVATE ISSUE D; TEENAGE ORGIES; SEXUAL FREEDOM; PRIVATE ISSUE C; PRIVATE ISSUE B; THE SENSUOUS COUPLES; BEDPLAY; SEXWORLD; SENSUOUS STRANGERS; PRIVATE ISSUE A; FALLOS UND FICKEN; PATTERNS OF SEDUCTION; SEXUAL LIBERTY; STRANGE SEX LAWS; THE SEXUAL REVOLUTION; SEX ON CAMPUS; ENRAPT; COME PLAY WITH ME; TEENAGE SLUTS, SLUTS, SLUTS; CLIMAX; PLEASURE SEEKERS, SEX VARIATIONS PART 3; CLIMAX 210; PLEASURE SEEKERS SEX VARIATIONS; IN TIGHT: DANDY LIONS; BOY PLAY; HARD 2; POCKET POOL; THE BOY IN THE BED; TEA ROOM FOLLICS; TRICK; TAILS BEFORE MIDNIGHT; GLORY HOLE; IN THE GROOVE; HOT AND HORNY; GAY SEX GUIDE; DAVID GOES LEATHER; TODS FIRST TIME; A.W.O.L.; THE PROSTITUTE; OVERSEXED; SEX OBSESSED WOMEN; and SEXUAL INFINITY, that it may be subject to such use as may be made of it under direction of the court, and that he continue his attendance from day to day and from term to term, until discharged by the court or by the said William T. Wilson.

Herein fail not, but have you then and there before said court this writ, with your return thereon, showing how you have executed the same.

Witness Hugh Taggart, Clerk of the District Court of Bell County.

Given under my hand, at office in Belton, Texas this 24th day of January, 1973.

HUGH L. TAGGART
Clerk of the District Court of
Bell County, Texas

Issued this 24th day of January, 1973.

HUGH L. TAGGART
Clerk of the District Court of
Bell County, Texas

By: F. Adams, Deputy

RETURN

Came to hand on the 25th day of Jan., 1973, at 9 o'clock A.M. and executed in Bell County on the same day by delivering a copy hereof to said witness, Michael McKelva. Served 1-30-73 8:15 A.M.

The distance actually travelled by me in serving such process was ____ miles and my fees are $____.

LESTER GUNN
Sheriff of Bell County, Texas

By D. R. Oldham
Deputy

* * * * *

DEFENDANT'S MOTION TO QUASH SUBPOENA

Filed February 1, 1973

(Caption Omitted in Printing)

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now the Defendant, Michael McKelva, and moves the Court to quash the subpoena issued by the

Clerk of the Court on the 24th day of January, 1973, and served upon him upon the 30th day of January, 1973, commanding him to appear and testify in the above styled and numbered cause of action at 9:00 o'clock A.M. on the 1st day of February, 1973, for the reason that the same is unreasonable and oppressive, and further that the Plaintiff has not advanced the costs for the production of the materials therein called for to be produced, and as grounds would further show as follows:

I.

This Defendant does not have [in] his possession, and can not produce after diligent search, and he has no knowledge whatever, [of] where can be found, the following magazines: Teenage Orgies, Fallos and Ficken, Come Play With Me, Glory Hole and/or Hot and Horny.

II.

This Defendant is not the owner of, and is not entitled to the ownership of, any of the other [matters] referred to in said subpoena, the full list of which is incorporated herein by reference.

III.

This Defendant would show the Court that in any event, Defendant is privileged under the Constitution of the United States of America and the State of Texas against [appearing] and testifying or producing such materials in that the requirement of the same might tend to incriminate him. Heretofore, on January 24, 1973, this Defendant was prosecuted in the Municipal Court of Temple, Texas on charges of selling obscene material, and is still charged with possession for sale of obscene material, and

although this Defendant makes no admission herein of the character of his testimony or of the character of the materials sought to be subpoenaed, he would show that the issuance of the subpoena is merely an attempt by the Plaintiff to require production of testimony and materials in violation of his Constitutional rights and by a means which would not be otherwise be available and to force his confinement by contempt or otherwise, or bring the threat of such confinement, in order to require him to testify against himself.

IV.

The statutes of the State of Texas, and the Code of the United States of America, provide procedures for the search and seizure of materials preadjudged to be unlawful in prior adversary hearings, and the issuance of the subpoena herein is merely an attempt by the Plaintiff to circumvent all of those procedures by resort to a quasi-civil procedure, all in violation of the Constitutional rights of this Defendant.

WHEREFORE, PREMISES CONSIDERED, this Defendant respectfully prays the Court that the subpoena heretofore issued and served upon him on the 30th day of January, 1973, be in all things quashed and that he be allowed the protection afforded by his rights under the Constitution of the United States of America and the State of Texas.

Respectfully submitted,

MALEY AND FRIEDMAN
By Karl A. Maley

* * * * *

TRANSCRIPT OF HEARING ON PERMANENT INJUNCTION

[5] BE IT REMEMBERED that on the 1st day of February, 1973, the above entitled and numbe[r]ed cause, was called for a hearing on an application for permanent injunction, and the following proceedings were had:

THE COURT: Mr. Maley, I believe you have a motion to present.

MR. MALEY: Yes, sir. We have a motion to quash the subpoena that we would like to present to the Court.

THE COURT: All right, you may proceed.

MR. MALEY: If it please the Court, I would like to allow Mr. Maness to make the arguments in support of the motion, and if it is all right with you, he will proceed.

THE COURT: All right, that is fine. You may proceed, Mr. Maness.

MR. MANESS: Your Honor, we have filed with the Court a motion to quash the subpoena that was issued on behalf of the Plaintiff in this action. This subpoena was served on Mr. Michael McKelva on the 30th day of January.

Mr. Wilson and I have discussed the fact that [6] five of these 52 magazines that are named in the subpoena are not now in the possession of Mr. McKelva, and, consequently, he is unable to produce those magazines. Mr. Wilson I think will stipulate, or he has stipulated, that those five magazines are no longer involved in this pro-

ceeding. They are named and described in Paragraph 1 of the motion.

THE COURT: All right, sir. As to those that are named, if there is no objection from Mr. Wilson, the subpoena will be modified to exclude those particular publications.

MR. WILSON: We have no objections to that, Your Honor.

THE COURT: All right, it will be so modified.

MR. MANESS: If the Court, please, with regard to the remaining 47 magazines, the Court will note that in Paragraph 2 of our motion we have asserted that Mr. Michael McKelva is not the owner of the 47 magazines that are now named in the subpoena or any other of the matters referred to in the subpoena. Of course, the other 47 titles are named therein. Consequently, since he has no ownership and has no property interest in these magazines, we feel that he cannot properly be required to produce these magazines. Any party that is named in the subpoena [7] cannot be required to produce property that he does not own.

Of course, the third paragraph, I suppose, is the essence of our case here this morning, of our position here this morning. What the City of Temple has attempted to do in this case is to compel the production in a civil, or what they claim to be a civil proceeding of 47 magazines. For the record we will certainly stipulate and state to the Court now these 47 magazines do deal explicitly with acts of a sexual nature. As a consequence of this fact, we feel that it is very clear that there is a substantial pos-

sibility of self-incrimination if the Defendant were required to produce these magazines.

We feel that this is the case primarily because the Defendants have previously been prosecuted under a City of Temple ordinance and in fact has been convicted under that ordinance for the sale of seven other magazines. These seven are not named in the subpoena, but that the character of the magazines that are named in the subpoena is such that a compulsory production of these publications would entail the same possibility of self-incrimination.

It is fairly clear we believe in view of the decisions of the United States Supreme Court that the character of the proceeding in which the material is being [8] sought is not relevant. In other words, it does not matter whether we are talking about an Agency proceeding or a proceeding before the Tax Court of the United States, a proceeding before the Interstate Commerce Commission, or as in this case, a proceeding on an injunction. It is the character of the documents, or the objects, or the letters, or whatever, and in this case they are magazines, that determines whether or not a Defendant can be compelled to produce them.

In view of the fact that there is this substantial possibility of self-incrimination; in view of the fact that seven other magazines that are of the same character as the 47 magazines named in the subpoena, that they have provided the basis for past criminal prosecutions; in view of the fact that criminal prosecutions are not only a very definite possibility, they are in fact a pronounced possibility, and so there is little reasonable doubt in these circumstances that the subpoena should be quashed because in fact it seeks to compel the person named in the

subpoena to incriminate himself, and, of course, this is prohibited by the Fifth Amendment to the Constitution of the United States.

It is significant also that although the character of these proceedings would probably be characterized as civil in nature that the Court is nevertheless hearing [9] this case under the provisions of Section 13 of Article 527 of the Texas Penal Code.

Essentially our position in that regard is that despite the fact that injunction proceedings ordinarily are purely civil in nature, nevertheless in these circumstances they are quasi criminal in nature. Certainly it is correct that the City Attorney of Temple could not in a criminal prosecution order the Defendant to produce the books, magazines, or other publication that might have a tendency to incriminate him in these proceedings. We think that the same principle is applicable here. In other words, the City of Temple cannot do indirectly what it cannot do directly. To a considerable extent this seems to be the purpose of the subpoena in this case, and that is to compel the production into evidence of matters that possibly and perhaps quite probably would be used in the future as a basis for a criminal prosecution, and that is either under the City ordinance enacted by the City of Temple or under Article 527 itself. In those circumstances the City cannot simply compel the production of this material because it is self-incriminatory.

Our position would be as is stated in Paragraph 4 of our motion to quash. If the City wishes to examine these magazines or wishes to have access to them, then it may quite properly secure a search warrant to search the [10] named premises and with such search warrant particularly

describing the magazines that they wish to examine. That is the constitutional way to do it. You cannot accomplish that result by a process of indirection, and that is by issuing a subpoena, that is to issue a subpoena in a case that they say is purely a civil proceeding and then say that the material that you produce might incriminate you because the Fifth Amendment is as applicable in these kind of proceedings as it would be in a purely criminal proceeding.

Your Honor, I believe that is the essence of our motion to quash. We do have one other motion that we would like to present. Would you like to have both motions at the same time or how would you wish to do that?

THE COURT: Well, first we will hear the City on your motion to quash.

MR. WILSON: Your Honor, I would like to point out, in the same order as Mr. Maness pointed it out, that is with reference to his position on the motion.

First of all, and again for the record, I will stipulate as to Paragraph 1, and that is that he does not have those particular magazines, and we will delete those.

As to Paragraph 2, he alleges in the Defendants' motion that Mr. McKelva is not the owner, that he does not have the ownership of these matters, and that is his pleading [11] and that, of course, would be his burden of proof to show if that fact is true. If he does not care to submit testimony to that effect, then I would submit some testimony showing for the record and for the Court that the test that he does have the control and custody of these items which are the subject of the subpoena, and as such this is what we are attempting to get, and that

is the person in control or in custody of the materials that are listed on the subpoena, and not the exact ownership.

As to Section 3 of the motion, it is the City's position that this is a civil proceeding and is under the Civil Rules of Procedure and that there are no criminal sanctions and so there will be no evidence that would be incriminating under the rules, and under the jurisdiction of this Court.

Further, it is our contention that all that can be accomplished in this proceeding is a civil determination of the subject matter involved in this litigation and that there is no contention on the part of the City or any attempt on the part of the City to get any evidence for any criminal prosecution and so it would not be incriminating for that reason.

Further, Section 13 of Article 527 is a proceeding that is admittedly under Section 527 of the Penal Code, but again it does make reference, as the Court is [12] aware, to injunctive proceedings, which is civil in nature. There is no proceeding under the Rules of Criminal Procedure that provide for any injunctive proceedings.

The last point is with reference to his allegations as to a search warrant. Of course, there again I would urge that this is not a criminal proceeding and the search warrant is a method of obtaining evidence for a criminal prosecution. We are not contending that this is a criminal prosecution. It is a civil proceeding in injunctive form. This was the purpose for our subpoena. We ask the Court that the matters alleged in the subpoena be subject to being produced here in Court today.

THE COURT: Do you have anything further on this motion, Mr. Maness?

MR. MANESS: Your Honor, in the argument that has been made by the attorney for the City of Temple, I think the argument has already been made in the past so many different times and in different contexts and that it has been amply answered by the multitude of Supreme Court decisions that deal with the situation in the non-criminal proceeding.

Where the Government or the State attempts to compel the production of tangible documentary evidence, and on that we have tax cases, for instance, the United States v. Court, Polluck v. The United States, [13] and this deals with situations, and also we have instances where the Internal Revenue Service has attempted to subpoena a taxpayer's documents into Court, and, of course, that is perfectly proper in a civil tax proceeding, and there is nothing wrong in compelling the production of the taxpayer's records. However, i[f] the circumstances are such as would indicate a substantial probability that the production of those records would tend to incriminate the taxpayer, then the Supreme Court of the United States has held that regardless of the non-criminal character of the proceedings, that the material is nevertheless not subject to production because to require a taxpayer under those circumstances to produce his records would tend to incriminate him.

It is very clear that the coverage of the Fifth Amendment is not to be determined by the nature of the proceeding in which it is asserted. The Fifth Amendment applies to all proceedings, to injunctive proceedings, to administrative proceedings, and to criminal proceedings.

It applies to interrogation by Police Officers out of Court. It applies across the board. We are not talking about the context of the proceedings in which the privilege against self-incrimination is asserted. We are talking about the character of material that is sought to be taken from the person who is subject to the subpoena.

In this case a party in a civil proceeding has [14] been asked to produce and has been asked to testify as a matter of fact in this proceeding with respect to, as we have stipulated, 47 magazines, the character of which, as we have also stipulated, is such that they deal with explicit sexual activities. What is the test in those circumstances is whether there is a substantial probability in requiring the party that is served with the subpoena to produce the evidence, which evidence would entail self-incrimination, and with the production of the magazines for possible use in a criminal prosecution, and we say that this would amount to a violation of the privilege under the Fifth Amendment, and we contend that it most certainly would, and that it must.

For one thing Mr. Wilson's representation that they are not interested in a criminal prosecution, that certainly does not bind for example the County Attorney, or anyone else within this particular jurisdiction or in the geographical area, who might be interested in prosecuting such a case, and that is for possession with intent to sell or for the sale of allegedly obscene material. It does not matter, even though Mr. Wilson is correct in asserting such a representation, the representation that all they are interested in here is the production in a civil proceeding. The Supreme Court has repeatedly held that that is not the test. The test is what happens when you require the person [15] to produce the material, these

particular books, magazines, and other publications and whether there is a substantial probability that such production will tend to incriminate them. It is obvious in this case that it would, and this is particularly obvious in view of the past criminal prosecutions in the City of Temple. Given that fact, we think it is very clear under these circumstances that this subpoena must be quashed because to require anyone to produce these sort of magazines, and that is regardless of the nature of the proceeding, would violate their Fifth Amendment rights.

THE COURT: The Defendants' motion to quash, as modified to exclude the five magazines listed in Paragraph 1 of that motion, is in all other respects overruled.

* * *

[21] RECESS.

THE COURT: Gentlemen, may we have all of the witnesses sworn at this time?

(The Court duly swears a group of witnesses.)

THE COURT: You may proceed, Mr. Wilson.

MR. WILSON: Your Honor, may we approach the bench for just a moment, please?

THE COURT: Yes, sir.

(Conference of Court and Counsel.)

MR. MALEY: Your Honor, for the record, Counsel for the City of Temple and the Defendant, the three

Defendants in the case, we wish to stipulate before the Court, with the agreement of the City, that in this case the certain named seven cases, which I will produce for the Reporter, that the Defendants herein, Michael McKelva and Allen Boyer, have been found guilty before a Municipal Court in the City of Temple for the sale of obscene matter, and that those matters, that each of those findings of guilty have been appealed to the County Court.

[22] THE COURT: Do you stipulate to that, Mr. Wilson?

MR. WILSON: We do so stipulate, yes, sir.

THE COURT: All right, the stipulation is approved and received into evidence.

Docket No. 31328; Defendant, Michael McKelva; Att: Mel Friedman; charge, sale obscene matter; witnesses, Vernon McKenzie, Kenneth Miller.

Docket No. 31329; Defendant, Michael McKelva; Att: Mel Friedman; charge, sale obscene matter; witnesses, Vernon McKenzie, Kenneth Miller.

Docket No. 31384; Defendant, Michael McKelva; Att: Mel Friedman; charge, sell obscene material; witnesses, Vernon McKenzie, Steve Klempa.

Docket No. 31385; Defendant, Michael McKelva; Att: Mel Friedman; charge, possession obscene material; witness, Vernon McKenzie.

Docket No. 31454; Defendant, Michael McKelva; Att: Mel Friedman; charge, sale obscene matter; witnesses, Vernon McKenzie, James Payne.

Docket No. 31334; Defendant, Allen Boyer; Att: Mel Friedman; charge, sale obscene matter; witnesses, Vernon McKenzie, Kenneth Miller.

Docket No. 31335; Defendant, Allen Boyer; Att: Mel Friedman; charge, sale obscene matter; witnesses, [22-A] Vernon McKenzie, Kenneth Miller.

THE COURT: You may proceed, Mr. Wilson.

MR. WILSON: Your Honor, the Court calls the Defendant, Michael McKelva, to the witness stand.

MICHAEL McKELVA

was called as a witness, and having been heretofore duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILSON:

Q. State your name and occupation to the Court, please.

A. My name is Michael McKelva. I live at 526 Wolf Street in Killeen, Texas. I am the operator of Mike's News in Temple, Texas.

Q. And is that Mike's Newsstand at 118-A South First Street?

A. Yes, sir, it is.

Q. Mr. McKelva, were you served with a subpoena requesting you to bring certain magazines, certain titled magazines to Court today?

A. Yes, sir, I was.

Q. And do you have those with you here today?

A. Sir, under the advice of Counsel, I refuse to [23] answer on the grounds that it may tend to incriminate me.

Q. Do you recall the day when you were served with a copy of this subpoena?

A. Yes, sir, I do.

Q. And what was that day?

A. I believe that was day before yesterday.

Q. Did you at that time have in your possession the magazines listed in the subpoena?

A. Under the advice of Counsel, I plead the Fifth.

Q. Are you saying to the Court then that you did not bring those into Court today, the magazines listed in that subpoena?

A. Under the advice of Counsel, I refuse to answer on the grounds that it may tend to incriminate me.

MR. WILSON: Your Honor, may we approach the bench?

THE COURT: Yes, sir.

(Conference of Court and Counsel.)

MR. WILSON: Your Honor, at this time, in response to the answers to the questions by Mr. McKelva as to the subpoena, a subpoena which was issued in this cause, I would ask the Court to instruct the Defendant, Michael [24] McKelva, to produce the magazines listed in the subpoena within a reasonable time and if he refuses to hold him in contempt of Court.

* * *

[28] THE COURT: Counsel, what would be a reasonable time within which to allow the witness to comply with the subpoena?

MR. MALEY: Do you mean a reasonable time in order to determine what costs may be involved, Your Honor?

THE COURT: No, sir. I mean a reasonable time within which to permit the witness to comply with the subpoena.

MR. MALEY: Your Honor, it is the position of the Defendant in this case, and it will be the position of this witness, too, who is a Defendant in the case, that it would make no difference what time was involved, that the matter would still be a matter of incriminating himself, of producing incriminating evidence [29] against this Defendant, and evidence which could later be used against him. The Defendant at any time, whether it be a reasonable time of 10 days, three days, or two hours, that the subpoena would still require the production of evidence which would tend to incriminate this Defendant.

THE COURT: I think that under the rule the Court should not entertain a motion to punish a witness for contempt until such time as that witness has had a reasonable opportunity to comply with the subpoena. What I would like now is to give the witness a reasonable time within which to comply with the subpoena before I consider the City's motion to punish him for contempt. Now, if you are saying that he needs no time, then we will proceed with the motion, but if he needs time, then the Court will try to give him a reasonable time.

MR. MALEY: Your Honor, I am not in a position to state to the Court what would be a reasonable time within which to produce it. I think this would be a mat-

ter that would be within the sound discretion of the Court, as to what a reasonable time would be, and that is in order to comply with the subpoena that was issued out by the District Clerk.

I am not in a position to advise the Court on that or to state on behalf of these Defendants what a [30] reasonable time would be, Your Honor.

THE COURT: All right. The Court finds that a tender has been made of the reasonable fees, and that the witness has declined to accept any fees. The witness is given until 1:00 o'clock this afternoon to comply with the subpoena. He is instructed to be back here at 1:00 o'clock this afternoon and in compliance with the subpoena to have the materials listed in the subpoena duces tecum, and failing which the Court will then entertain the City's motion to hold the witness in contempt.

MR. MALEY: Please note our exceptions to the ruling of the Court.

THE COURT: All right, you may step down.

(Witness excused.)

* * *

[76] THE COURT: Before the Court recesses until 1:30 P.M., I want to make it clear that Mr. McKelva was given until 1:00 o'clock today to respond to the subpoena.

MR. MALEY: Yes, sir. The Defense understood [77] the instruction.

THE COURT: All right, we will recess until 1:30.

RECESS.

THE COURT: Are you ready to proceed, gentlemen?

MR. WILSON: Yes, sir, Your Honor.

MR. MALEY: The Defendants are ready, Your Honor.

THE COURT: All right, you may proceed, Mr. Wilson.

MR. WILSON: Your Honor, we will recall the Defendant, Michael McKelva, to the witness stand.

MICHAEL McKELVA

(Recalled.)

DIRECT EXAMINATION

By Mr Wilson:

Q. You are the same Michael McKelva who was testifying earlier here in Court?

A. Yes, sir, I am.

Q. And are you further the same Michael McKelva [78] who was instructed earlier by the Court on this day, the 1st day of February, 1972, in open Court to bring with you to Court at 1:00 o'clock certain magazines listed in the subpoena duces tecum with which you testified that you were served?

A. No, sir. It was 1973.

Q. I am sorry, you did not answer my question. Are you the same person?

A. No, sir, it was in 1973.

THE COURT: Apparently you are saying 1972, Mr. Wilson, instead of 1973. Try your question again.

Q. (By MR. WILSON) All right, 1973, and I'm sorry.
A. Yes, sir.
Q. I am sorry, but I just haven't got over the change of the year yet.
A. Yes, sir.
Q. Do you have those magazines for the Court today?
A. No, sir.
Q. You do not?
A. No, sir.
Q. Have you attempted to secure those magazines?
A. No, sir.
[79] Q. Have you made any effort at all to obtain those magazines?
A. No, sir.
Q. Were you fully aware at the time of the Court's instructions to bring certain magazines before the Court?
A. Yes, sir.
Q. Is it your testimony then that you are willfully refusing to bring those magazines pursuant to the request made to you by the Court?
A. Yes, sir.

* * *

[80] THE COURT: Do you have any questions that you want to ask this witness at this time?

MR. MANESS: Your Honor, if I might, I would like to ask the witness one question.

THE COURT: All right.

MR. MANESS: Mr. McKelva, are you refusing to produce the 47 magazines contained in the subpoena solely because you believe that the production of such magazines would entail a substantial possibility of self-incrimination?

[81] A. Yes, sir, I do.

MR. MANESS: That is all I have, Your Honor.

THE COURT: You may stand down, Mr. McKelva.

(Witness excused.)

MR. WILSON: Your Honor, at this time I reurge my motion for the Court to find the Defendant in contempt of Court because of his failure to comply with the subpoena duces tecum.

* * *

[82] THE COURT: The Court finds the Defendant Michael McKelva to be in contempt of Court and will treat the failure of the Defendant to respond to the subpoena as an admission that the publications named in the subpoena are obscene as alleged by the City and will defer any assessment of punishment until the conclusion of this trial.

You may proceed, Mr. Wilson.

MR. MANESS: Pardon me, Your Honor, but may we except to the Court's ruling?

THE COURT: Yes, sir.

MR. MANESS: We would also point out to the Court,

and again the Court has ruled, and we do not by any means want to be argumentative, but precisely this situation has arisen before in the case styled Hunt v. Rodriguez, and this was before the United States Court for the Western District of Texas. In this case the District Judge, like Your Honor, determined that the failure [83] of the Defendant to produce the publications in question constituted something like a presumption in effect that the materials that they failed to produce were obscene.

On appeal the U. S. Circuit Court of Appeals explicitly disclaimed that theory. They pointed out that it amounted to nothing less than penalizing a party to the lawsuit for exercising what they believed to be a Federal constitutional right. To that extent, we would certainly except to any decision on the part of the Court at this time to hold that the 47 magazines named in the subpoena are obscene simply because the Defendant did not produce them in Court.

THE COURT: I am not making any finding—

MR. MANESS: Yes, sir, I understand.

THE COURT: But the fact that Counsel himself admitted this morning in open Court that these materials were of the same nature as those produced and offered in evidence this morning, and this coupled with the fact that you said that the reason that the Defendant would not bring them into Court, and that coupled with the fact that he has now declined to do so, I think justifies the Court in treating that as an admission, and that the matters are of the same nature as these that are here in Court, and so the Court is taking it as an admission to that extent.

[84] MR. MANESS: Yes, sir, I understand the Court's ruling, sir, and I would only point out that our position in the matter is that the 47 magazines must be judged individually and according to their content, and we do not by any means contend that simply because the other seven magazines were adjudicated obscene that these 47 magazines are also obscene. In fact, our contention is directly to the contrary.

* * *

[119] CROSS EXAMINATION

BY MR. MALEY:

Q. Mr. McKenzie, you never observed the sale of any of these materials to anyone, did you?

A. No, I did not.

Q. If a minor came into the possession of it, or any similar material, or whatever that question was, you never did observe how a minor obtained that material, did you?

A. No, sir, I did not.

Q. You are not then testifying that these Defendants at any time sold that material to a minor, are you?

A. No, sir, I am not.

Q. These items that are contained on the list that has been marked Exhibit C-8, did you at any time examine the contents of these?

[120] A. No, not the contents.

Q. All right, you never opened the cover or saw what was on the inside of these magazines?

A. No, I did not.

Q. Then for all you know they could have been filled with printed material, just writing or printed material, with the pictures just on the front and the back?

A. Yes.

Q. You could not testify otherwise, could you?

A. I could not testify either way.

Q. You testified as to what appeared on the outside of some of these materials was similar in nature to what appeared on the outside of some of the other matters. If I were to ask you questions concerning specific issues, could you tell me what that issue showed?

A. No, I could not.

Q. Then it is correct, is it not, that you could not describe to the Court what is on the outside of each of these magazines?

A. I could describe that on most of these magazines the same type of little white coverings were on them.

Q. All right, but as to what was depicted on the exterior of the magazine, you could not testify as to what was on the exterior of the magazines, could you?

A. No, sir, I could not other than that they were [121] similar to these.

Q. But you could not testify as to the specifics of the similarity, could you?

A. No, I could not.

* * *

[149] AND BE IT REMEMBERED FURTHER that on the 2nd day of February, 1973, with all parties being present, the hearing of the above entitled and numbered cause, was continued, and the following proceedings were had:

THE COURT: Counsel, does either side have anything further that they want to put in evidence?

MR. WILSON: No, sir, the Plaintiff does not.

MR. MALEY: No, Your Honor, the Defendant does not.

THE COURT: The Court will recall the Defendant Michael McKelva to the witness stand.

MICHAEL McKELVA
(Recalled)

THE COURT: Mr. McKelva, you have been adjudged to be in contempt of this Court for having failed [150] to observe a subpoena duces tecum to bring certain matters with you as a witness. In your testimony with reference to why you failed to do this, you first indicated that it was on the advice of Counsel that you were declining to obey the subpoena, and so I want to ask you directly this morning, is your disobedience to this subpoena your own decision, or is it on the advice of Counsel, and if so, what Counsel?

A. It is on the advice of Counsel, sir, and Mr. Friedman, Mr. Maley and Mr. Maness.

THE COURT: Does either Counsel have any questions that they want to ask this witness?

MR. MANESS: Your Honor, I would only like to ask Mr. McKelva, in the event that his Counsel were to advise him that his privileges against self-incrimination were not endangered by producing the 47 magazines in question, whether or not under those circumstances he would produce the magazines?

A. I would.

MR. MANESS: Thank you, sir, and that is all.

THE COURT: Do you have any questions, Mr. Wilson?

MR. WILSON: No questions, Your Honor.

THE COURT: You may step down, Mr. McKelva.

(Witness excused.)

[151] THE COURT: The Court will now hear argument and authorities, if Counsel cares to present them.

(Argument of Counsel.)

[152] RECESS

THE COURT: The Court will come to order.

This Court finds that the exhibits that have been introduced into evidence, the seven specific titles, and I believe there were seven, and is that correct, Mr. Wilson?

MR. WILSON: That is correct.

THE COURT: The Court finds that these seven exhibits are obscene as that term is defined under the State law as well as under the City ordinance.

The Court also finds that by admission of counsel the forty-seven named publications in the subpoena duces tecum are also obscene as that term is defined by the State law and the City ordinance.

The Court is enjoining the exhibiting, the displaying, the selling and the offering to sell of the publications that

have been introduced into evidence and the forty-seven that are named in the subpoena duces tecum.

The third section of the injunction will be any other publication that meets the definition of obscenity as contained in the State law, Article 527.

The Court is taking judicial notice of the fact that the City of Temple is a home-ruled city and also of the similarity of Article 527 of the Penal Code and the [153] City ordinance in this case.

The Court is finding not only Mr. Michael McKelva in contempt of this Court but is also finding Mr. Maley and Mr. Maness as his attorneys guilty of contempt of court.

In each of these cases the Court is fixing the punishment for this contempt at ten days confinement in the Bell County Jail and a fine of two hundred dollars.

Is there a Deputy Sheriff here?

SHERIFF: Yes, sir, I am here.

MR. WILSON: Your Honor, may I bring one point up, please?

THE COURT: Yes, sir.

MR. WILSON: As to the injunction under Article 527, is it further the order of this Court that these magazines be seized?

THE COURT: The Article does not provide for the seizure of the magazines. It provides for the delivery of those magazines to the Sheriff. The order of the Court will include a provision for the Defendant to deliver those

publications to the Sheriff for destruction as is provided for by Article 527.

MR. WILSON: Thank you, sir.

MR. MALEY: Your Honor, if we may be heard on one item here?

THE COURT: Yes, sir.

[154] MR. MALEY: First, of course, the Defendant excepts to the ruling of the Court and gives notice of appeal.

THE COURT: Yes, sir.

MR. MALEY: As far as the matter in connection with the granting of the inju[n]ction, the Defendant would request the Court to set and to allow, and we can file the formal papers today in that regard, for a supersed[e]as bond on that matter pending appeal. We request the Court to consider the amount necessary on the supersed[e]as bond on the action on the injunction.

We would further like to point out to the Court that if there is any contempt to be adjudged against counsel for the Defendant in this matter, that any instructions that were made to the Defendant in this case and particularly to the Defendant Michael McKelva, that any instructions made in that nature were instructions made by counsel to that Defendant in connection with the delivery of these materials, that there is no evidence before the Court to show that such instructions were made in the presence of the Court, and we say if we have any contempt in this matter, and we say if any, it is not that we

were intending any contempt of this Court, but that any contempt would be a matter made outside of the Court, and counsel for the Defense should be entitled, if there is any citation [155] for contempt, to a reasonable time and to be cited to appear and show cause as to why they should not be held in contempt, and that we should be allowed a reasonable time to prepare a defense in that matter and then to appear and show cause.

THE COURT: Mr. Maley, I want to point out to you that this Court has been most reluctant to find Counsel in contempt. As a matter of fact this [is] the first time in the history of this Court that I have ever adjudged an attorney to be in contempt of this Court but I find this Court totally frust[r]ated at the attitude of Counsel in denying the access to the evidence which was contained in the subpoena duces tecum.

This Court has not been permitted to rule on the admissibility of that evidence. You have ruled on it, on the admissibility of that evidence.

I have found you in contempt because you have usurped the authority of this Court.

You are familiar with the statutes of the State of Texas which give you a hearing on this matter. If you desire to be released on personal bond there is a statutory provision if you desire to file a motion and you will be rel[e]ased on bond and this matter will be set for hearing before another Judge, who will be appointed by the Administrative Judge of this District.

[156] MR. MANESS: Your Honor, may I be heard in my own behalf on one point?

THE COURT: Yes, sir.

MR. MANESS: If it please the Court, I certainly appreciate the Court's position. I think what we have here is not a situation, and I hope this is correct, where Counsel have deliberately and intentionally attempted to frustrate the Court. I think that rather what we have is where there is a philosophical difference between Counsel for the Defendant and the Court with regard to the applicable law as to self-incrimination and the production of evidence in a civil case.

THE COURT: Which could have been reached by a motion to suppress that evidence or by an objection to an attempt to introduce it. Counsel himself has admitted that Defendant is in possession of these items, denying the ownership of them very carefully but admitting possession of them. You are simply saying to the Court that because Counsel thinks that this is inadmissible evidence that it will not be subject to a subpoena under the power of this Court.

This Court is offended by your ruling, gentlemen. I am imposing the punishment as previously announced, ten days in jail and a two hundred dollar fine in each case, which is subject to your motion if you desire to file one.

[157] MR. MANESS: Your Honor, on my own behalf, and on Mr. Maley's account, I apologize to the Court. I certainly want to express to this Court my own position and that is that it was not our intention or our purpose to offend the Court, and in that respect we apologize.

THE COURT: Is there anything further from either one of you?

MR. MALEY: No, sir, Your Honor. May we have a short period or a reasonable time in order to prepare our motion?

THE COURT: You may have an opportunity to prepare your motion, yes.

MR. MALEY: Thank you, Your Honor.

THE COURT: And you may have access to my library if you desire.

MR. MALEY: Thank you, Your Honor.

THE COURT: That is all.

* * *

169th District Court

Bell County, Texas

COMMITMENT

THE STATE OF TEXAS

To The Sheriff of Bell County, Texas: Greeting:

The court having fully completed the examination of this cause, it is considered that the evidence is sufficient to find the defendant Michael McKelva, guilty of contempt of the 169th Dist. Court of Bell County, Texas, for the offense of failure to comply with subpoena duces tecum & court order and for said offense it is ordered by the court that the said defendant be confined in Bell County Jail for 10 days & pay a fine of 200.00 Dollars.

Witness my official signature at Belton, Texas, this 2nd day of Feb., 1973.

J. F. CLAWSON, Judge
169th Dist. Ct.
Bell County, Texas

* * *

NOTATION REGARDING JUDGMENT OF CONTEMPT AND ORDER OF COMMITMENT

The formal written judgment of contempt entered by the Court below against Michael McKelva, Karl A. Maley and Michael Anthony Maness on February 6, 1973, together with the formal written order of commitment entered against Michael Anthony Maness on February 7, 1973, is reproduced in Appendix A of the petition for certiorari at pages 30-32.

* * *

TRANSCRIPT OF THE CONTEMPT HEARING

[2] BE IT REMEMBERED that on the 11th day of May, 1973, the above entitled and numbered cause came on regularly for a hearing on contempt motions filed by the Court against the Honorable Karl A. Maley and Honorable Michael A. Maness, and the Honorable James R. Meyers, of Austin, Texas, sitting as Special Judge; all parties being present, the following proceedings were had:

THE COURT: I call Cause No. 57,284-C in the matter of the contempt in an action styled The City of Temple v. Michael McKelva, et al.

MR. DIBRELL: Your Honor, the Attorney General's office was requested to appear in this proceeding by the Presiding Judge of the Administrative District, Judge Herman Jones. The actual capacity in which we make our appearance here I am not absolutely clear on, [3] but I would assume we would be in the position of representing the Court or upholding the contempt as found by Judge Clawson, who presided over this Court in the actual matters in which the contempt was found.

In that position we are here at the request of the Presiding Judge and we are ready to proceed.

THE COURT: All right, sir. Mr. House?

MR. HOUSE: Your Honor, in truth and reality, I believe this contempt is a separate proceeding since Mr. McKelva has already been found in contempt with no right of appeal, and this is concerning Mr. Maley and Mr. Maness.

THE COURT: Yes, that is the contempt that I meant. It is in this same action. Now, I would like to hear from you, if you want to be heard from, on how you wish to proceed.

I think that the record does reflect—and I have looked at it—that there was a contempt found and a sentence ordered against both Mr. Maness and Mr. Maley. They had the right and they exercised that right to be tried by another Judge on the guilt or innocence of that contempt.

MR. HOUSE: Yes, sir.

THE COURT: And I take it that is what we are here now on.

[4] MR. HOUSE: That is correct, Your Honor.

THE COURT: All right, go ahead.

MR. HOUSE: At this stage of the proceeding I believe it is the burden of proving it on the moving party rather than against us to show that we are not in contempt.

MR. DIBRELL: Your Honor, in that connection, we are willing to assume that burden.

THE COURT: All right, sir.

MR. DIBRELL: I think that Article 1911 does indicate that your position in presiding over this particular matter is to find either guilty or innocent, so I will say that I will be willing to assume that burden and I think that is perfectly proper.

THE COURT: I think that is right, Counsel.

MR. DIBRELL: But in that connection, Your Honor, I would like to point out to the Court that it would be my view, and I will stand corrected if the Court views it in a different way, that the record for review would be of course what actually occurred and that was present before Judge Clawson when he was trying the matter on which he ruled the contempt.

I cannot see where it would open it up for any additional testimony or evidence in the matter. It would

still be a matter of you making an independent [5] determination on the basis of what record was before Judge Clawson at the time of the contempt.

THE COURT: What is your view?

MR. HOUSE: Your Honor, I would submit that I agree completely with the gentleman.

THE COURT: Did you say that you agreed or disagreed?

MR. HOUSE: I agree.

THE COURT: That certainly makes it easier.

* * *

[21] MR. DIBRELL: * * *

I think the question is actually whether Judge Clawson erred in holding the witness Michael McKelva in contempt of Court for refusing to obey the subpoena duces tecum. Of course, quite obviously if Judge Clawson did not have the power to hold McKelva in contempt, then he could not under the state of the record hold his counsel in contempt because their contempt is based upon the question of actually advising the witness not to fulfill the lawful order of the Court.

* * *

[50] THE COURT: I will be very candid with you. [51] I am to this point, I think the record does support a finding beyond a reasonable doubt that Mr. McKelva

was advised not to bring the materials. I am dubious that materials displayed for public sale are Fifth Amendment protected, but I think it is a very close point. I really want to read that case as being at least one case that apparently is directly in point.

MR. HOUSE: Your Honor, at this time, I would like to submit what I think is a rather logical extension of the problem, if we assume, argumento, that the Defendants Mr. Maley and Mr. Maness—

THE COURT: They are the Respondents really, I think.

MR. HOUSE: All right, the Respondents, and if they did in fact advise him not to bring the films, but there is a definite distinction between advising him not to bring the films, and I am sorry, I don't mean the films, but not to bring the books, but there is a definite distinction between that advice and instructing him not to, which the record does not reflect.

Now, there are two things which I would like to point out concerning this. Of course, we deny that this happened, based upon the record, and we assert in fact that it did not happen, and only that he was advised as to his Fifth Amendment privilege, but if you are saying [52] argumento that they did do so, then it must go, and particularly as was pointed out when the attorneys have a definite bona fide disput as to whether or not the subpoena was lawful and—

THE COURT: Let me read you though, and the question was, did your disobedience to this subpoena, is it your own decision, or is it on the advice of Counsel, and

if so, what Counsel? The answer was, it was on the advice of Counsel, and it was Mr. Friedman, Mr. Maness and Mr. Maley. Now, the question is did you disobey this subpoena on your own decision and it wasn't on your own decision after the advice of Counsel, it was either on your decision or on the advice of Counsel.

MR. HOUSE: What was the advice, Your Honor?

THE COURT: Well, the question is, did you base your disobedience to this subpoena on your own, or did you base it on the advice of Counsel? Now, that is read by me to say, my Counsel advised me to disobey the subpoena.

MR. HOUSE: Well, Your Honor, I would respectfully submit, No. 1, advice of Counsel cannot be less of what would happen if you did produce it than what would happen to you if you didn't produce, and then the client may just take it upon himself to say that that was the advice of Counsel.

THE COURT: Yes, but that is not the way the [53] question is phrased.

MR. HOUSE: I think, Your Honor, if you will read the same page a little further and where Mr. Maness asked him the question in specific point, would you have produced the books if we had told you that this would not endanger your Fifth Amendment privilege? The answer was, yes, and that clears it up. Plus the fact, even if you read the record as to the point that this be beyond a reasonable doubt, and since this is a criminal proceeding, I assume that that is the standard of proof that you are going on, is that correct?

THE COURT: Yes, sir. However, the only evidence really is this one page.

* * *

[56] THE COURT: Let me get you to do this, and I do not like to do this, but quite obviously if I hold the Respondents here in contempt I am going to permit bond for the purpose of making an application for a writ of habeas corpus, but I want to see and I want a chance to read the Louisiana case and any other case that is directly in point as you say it is.

* * *

[64] THE COURT: Yes. It is not my purpose here, if I find them in contempt to have them jailed until you can file a writ of habeas corpus. We have to test it in some manner other than that.

MR. HOUSE: Yes, Your Honor, and I appreciate that.

THE COURT: Yes, and I imagine your clients do more.

* * *

NOTATION REGARDING SECOND JUDGMENT OF CONTEMPT

The second formal written judgment entered by the Respondent against Karl A. Maley and Michael Anthony Maness on October 1, 1973 is reproduced in Appendix A of the petition for certiorari at pages 27-29.

* * *

NOTATION REGARDING ORDER OF COURT OF CRIMINAL APPEALS OF TEXAS

The order of the Court of Criminal Appeals of Texas denying the Petitioner's motion for leave to file an original application for the writ of habeas corpus on October 11, 1973 is reproduced in Appendix B of the petition for certiorari at page 33.

* * *

NOTATION REGARDING ORDER OF SUPREME COURT OF TEXAS

The order of the Supreme Court of Texas denying the Petitioner's original application for the writ of habeas corpus is reproduced in Appendix C of the petition for certiorari at page 34.

* * *

ORDER CONTINUING PERSONAL RECOGNIZANCE BONDS

(Filed October 12, 1973)

(Caption and Jurat Omitted in Printing)

It having been made known to the Court that KARL A. MALEY and MICHAEL ANTHONY MANESS, Respondents in the above styled and numbered cause, have this day been denied the writ of habeas corpus by both the Court of Criminal Appeals of Texas and the Supreme Court of Texas, and it being further represented to the undersigned Judge by Respondents that they will seek further review of the judgment of contempt previously entered against them in this cause, Mr. Maley by application for the writ of habeas corpus to the United States

District Court for the Western District of Texas, Mr. Maness by petition for the writ of certiorari to the Supreme Court of the United States, and it further appearing to the Court that the personal recognizance bonds previously executed by Respondents as officers of the Court in accordance with Article 1911a, V.A.T.S., should remain in effect pending final disposition of the proceedings in those Courts,

IT IS ACCORDINGLY ORDERED that Respondents KARL A. MALEY and MICHAEL ANTHONY MANESS shall remain enlarged on the personal recognizance bonds previously executed by them on February 2, 1973 in Cause No. 57,284-C before the 169th Judicial District Court of Bell County, Texas, until 12 o'clock noon on October 26, 1973.

IT IS FURTHER ORDERED that if an application for a Federal writ of habeas corpus or a petition for writ of certiorari is filed on behalf of either Respondent before 12 o'clock noon on October 26, 1973, the aforesaid personal recognizance bond of such Respondent shall remain in force and such Respondent shall remain enlarged on such bond until the final disposition of such application for the writ of habeas corpus or petition for writ of certiorari.

IT IS FURTHER ORDERED that no attachment or other execution shall issue on the judgment of contempt against Respondents until the final disposition of any such application for the writ of habeas corpus or petition for certiorari.

JAMES R. MEYERS
Judge Presiding

* * *

ORDER CONTINUING PERSONAL RECOGNIZANCE BONDS

(Filed October 25, 1973)

(Caption and Jurat Omitted in Printing)

It having been made known to the Court that Karl A. Maley and Michael Anthony Maness, Respondents in the above styled and numbered cause, have each sought further review of the judgment of contempt entered against them on September 28, 1973, and it further appearing to the Court that the personal recognizance bonds previously executed by Respondents as officers of the Court in accordance with Article 1911a of the Revised Civil Statutes of Texas should be continued in effect pending the final disposition of the proceedings initiated by the Respondents,

IT IS ACCORDINGLY ORDERED that Respondent Karl A. Maley shall remain enlarged on his personal recognizance bond until the final disposition of his application for the writ of habeas corpus in the United States District Court for the Western District of Texas, Waco Division, including any appeal therefrom to the United States Court of Appeals for the Fifth Circuit.

IT IS FURTHER ORDERED that Respondent Michael Anthony Maness shall remain enlarged on his personal recognizance bond until the final disposition of his petition for the writ of certiorari in the Supreme Court of the United States.

IT IS FURTHER ORDERED that no writ of attachment or other execution shall issue on the judgment of contempt against either Respondent until final disposition of his application for the writ of habeas corpus or petition for the writ of certiorari.

IT IS FURTHER ORDERED that if either of the foregoing proceedings involving Mr. Maley's application for the writ of habeas corpus or Mr. Maness' petition for the writ of certiorari should terminate in a final judgment or order having the effect of upholding the judgment of contempt against such Respondent, and if at that time the $500 fine against such Respondent shall remain unpaid, a writ of attachment shall then issue against such Respondent, ordering him to surrender himself to the custody of the Sheriff of Bell County, Texas, to remain under confinement in the Bell County Jail until such fine has been paid.

SO ORDERED on this 25th day of October, 1973.

JAMES R. MEYERS
Judge Presiding